UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

ADV No. 08-01420 (JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

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SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

LEHMAN BROTHERS, INC.

Defendant.

- - - - - - - - - - - - - - - - - - - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

February 25, 2010

11:10 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Motion for Order Approving Trustee's Allocation of Property of the Estate

Motion filed by the Trustee for an Order Upholding the Trustee's Determination Regarding Claim of Fifth Third Structured Large Cap Plus and Expunging Objection with Respect to that Determination

Joint Motion filed by the Trustee and SIPC for Entry of an Order Striking Fifth Third Structured Large Cap Plus Fund's January 6, 2010 Motion for Summary Judgment

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MR. KOBAK: Good morning, Your Honor. James Kobak, Hughes, Hubbard & Reed, LLP for the SIPA Trustee. We have two matters on the calendar this morning, Your Honor. The first one listed is the allocation motion which at this point is uncontested with respect to the order that we presented. So I would propose we do that first. And my colleague, Mr. Chamie, will then handle the dispute with Fifth Third, which is the other matter on the calendar.

THE COURT: Fine.

MR. KOBAK: Your Honor, our position on the allocation motion this morning is supported by the SEC and SIPC. The SEC has actually taken a formal agency position and believes their interpretation of their rules and the interaction of those rules with SIPA on what constitutes customer property is entitled to Chevron deference. The other body with responsibility in this area, SIPC, also agrees and points to the long history of allocations of property in other SIPC cases. The basic principle behind this motion which I think everyone agrees at this point is that the SEC customer protection rules, the reserve account, and the segregation rules, particularly are supposed to work together with SIPA and its definition of customer property. And what that means in substance is just as when a broker-dealer in operation would

have to make up for a deficiency in its reserve account or capital that should be segregated for customers, no matter what the cause, so too the trustee in a SIPA liquidation has to allocate unsegregated property to make up for a demonstrated compliance deficit when appears that will be necessary to avoid shortfalls in payments to customers. Of course, if it turns out there is no shortfall and there is an excess, that gets allocated back to the general estate to satisfy all creditors.

This principle is consistent with the nature of broker-dealer operations, with the regulations for the protection of customers and the SEC and SIPC both emphasized, and it has been applied in many other SIPA cases cited in the brief, including, particularly, the next largest SIPA liquidation to this one, the MJK case in Minnesota with which Mr. Caputo, who is here today, is quite familiar. No one, as I understand it, really objects to this principle of law. It's embodied in the 1988 amendments to SIPA which now appear as Section 78-lll-4(d) which basically says that property which should have been segregated or held for customers by virtue of -- by operation of law or to comply with regulations is deemed part of customer property, and that's the essential legal principle that underlies this motion.

We have had disagreements and continue to have some disagreements with some of the parties as to what specific items actually constituted regulatory deficiencies. We've

spent a lot of time over the last several weeks, Mr. Wiltenburg and his team, particularly, sharing information, engaging in dialogue with the Chapter 11 debtors, the creditors' committee in their case, and several of the other objectors. They and their experts have met with our team and our expert Mr. McIsaac, who's a recognized industry expert on brokerage regulatory matters. Mr. McIsaac who has submitted an affidavit -- actually two affidavits -- setting forth his opinion and the basis for them and as far as the items in this applications are concerned, no one, as I understand it, anything in that affidavit. Mr. McIsaac is here in court today and I would proffer his affidavits as a factual support for our motion. He is here today, so if any party wishes to cross-examine him, we're willing to do that.

THE COURT: It's unlikely that anybody will want to cross-examine him in the context of an uncontested motion, but let me ask if there's any objection of my receipt into evidence of the affidavits that have been proffered.

MR. KRASNOW: Your Honor, just briefly. Richard Krasnow, Weil, Gotshal & Manges on behalf of the Chapter 11 debtors. We certainly have no objection to the affidavit being submitted as a proffer. As to those items as to which the trustee's going forward, as Mr. Kobak indicated, there remains some issues, questions with respect to certain of the items that were covered by the motion which sought a reallocation of

approximately 4.9 billion dollars of noncustomer property/customer property. I believe that the trustee's going forward on an uncontested basis with respect to items that almost approximate 2.2 billion. Therefore, as to the balance, we're assuming but we'd like confirmation from Mr. Kobak that they're not submitting the affidavit as a proffer with respect to those remaining items. If that's the case, we have absolutely no objection to what's being proposed.

THE COURT: Let's confirm your understanding.

MR. KOBAK: Yes, Your Honor, that's correct, and when we come back with respect to other items, we'll make a proffer or offer other proof at that point. As Mr. Krasnow correctly notes, we did identify a number of potential areas as well as some areas which were still under investigation and still are under investigation by the trustee, and those items, depending on how you value things, totaled approximately 4.9 billion dollars. As a result of this process of due diligence and dialogue, we've basically agreed with everyone about four sets of items that everyone agrees is proper, at this point, to allocate to customer property, and I believe the best estimate of the value of those items is about 2.15 billion dollars.

The other items, what we're going to do is continue this process. We're going to continue to meet with people, have Mr. McIsaac available, see if we can't reach an agreement on many of them with respect to those that we're unable to

reach agreement. At an appropriate time, we anticipate that we'll be back to Your Honor to get a decision. We think in a lot of instances, there's further factual work to be done, sometimes on our side, sometimes on their side. Frankly, there's not so much extra property, unfortunately, at this time that it would really make sense to try to allocate a lot of other things. So we'll come back at an appropriate time.

We would ask that Your Honor enter the order that we submitted on Monday which is a revised order. If you look at the statement that we submitted at that time, I think you'll see there are some -- if you go through the history of blacklines, there are some very substantial changes that were made to the initial order, which I'll get to in a minute.

I think it would be appropriate to have this matter carried forward for the June 24th hearing date, which is one of the dates we reserved for LBI customer matters at which time -- it would be in the nature of a status report. I think at that point, we'd kind of know where we're going, what further proceedings there may be with respect to this.

THE COURT: Okay, there's someone who wants to speak who's behind you, but before he is recognized formally, I just want to be clear on what's really happening, procedurally.

The allocation motion, in effect, is being resolved in parts?

MR. KOBAK: Yes.

THE COURT: And today is part one, it's uncontested, and the balance of approximately 4.9 billion dollars in items that may lead to further agreement or may lead to ongoing controversy is to be effectively adjourned, sine die --

MR. KOBAK: That's correct.

THE COURT: -- with the understanding that there'll be a status conference on where things stand with respect to those disputes on June 24th?

MR. KOBAK: That's correct. And the remaining items that we've identified are 2.8 billion. It's 2.1 billion that's covered by this; it was originally 4.9. There are some other items that are under investigation, as we noted in our papers, and it may be that there will be some things that will be added to that 2.8 billion, if it's necessary to do so and if we have that much property to allocate.

THE COURT: Okay, just so it's clear. We started with 4.9 billion; we're dividing it into two groups --

MR. KOBAK: Right.

THE COURT: -- 2.1, which is uncontested, and the balance which is still subject to ongoing negotiation and litigation if necessary?

MR. KOBAK: That's correct, Your Honor.

THE COURT: Okay.

MR. KOBAK: And just if I may, briefly, the other changes in the order in addition to limiting it to the four

items and the 2.1 billion dollars, we made a number of other changes in broad terms, and in substance, those are that there'll be no res judicata or preclusive effect or estoppel effect on parties in other disputes where some of these items may be in some way or another involved, such as the Barclays dispute, most notably, but there are several others.

We also agreed with Western Bank and the other repo claimants and some of the other objectors that it was premature to ask the Court to actually approve a distribution in advance, so we contemplate that when we're done with the allocation, know where we stand with respect to customer property, and with respect to the amount of customer claims and what's in dispute and are preparing to make a distribution, whether partial or total, we would come to Your Honor with an accounting, more or less, of what we have available, what the claims are, what, if anything, needs to be reserved for at that point and how we propose to distribute the property.

We've also agreed, as I think we've always said we would, that with respect to any contested claims, and the repo claimants, for instance, we have a dispute with them as to whether they're entitled to customer treatment or not, but until that dispute is finally decided, we'll reserve for the full amount of their claim so that they'll be treated, if they are customers, the same way any future customers are with respect to distributions. And we do intend and are working

with the parties to bring the dispute about how at least certain repo transactions should be treated for SIPA proceedings on before Your Honor at the hearing on the 24th.

And, Your Honor, that really concludes my remarks. Unless Your Honor has any questions, we would ask you to enter the order that we filed on Monday afternoon which, as I've said, I think all parties now agree to and will submit a copy of that order at the conclusion of the hearing.

THE COURT: I'm prepared to do that. I did note that there was an attorney who seems interested in making some comments. So before I say yes to what you've just said, let me at least give him an opportunity to be heard.

MR. MOSS: Good morning, Your Honor. Joel Moss from Cleary Gottlieb Steen & Hamilton LLP on behalf of Barclays Capital. Just to echo what Mr. Kobak said, Barclays Capital does not have an objection to the relief today being granted, subject, of course, to our broad reservation language in terms of nothing about the motion, the order, the McIsaac declaration, having res judicata or collateral estoppel effect, or impairing our rights in the Rule 60 litigation or with respect to Barclay's claims for undelivered assets allegedly not delivered by the trustee under the APA.

One other point of clarification that I think all parties would agree about, while the amount of aggregate property that you're dealing with today is approximately 2.1

billion dollars, as I understand it, the starting point from the whole deficiency calculation in terms of what a shortfall was or was not, had LBI, their last 15(c)(3) calculation, as having an excess in their reserve account of approximately 1.2 billion dollars. I just want to make sure that the four items that Mr. Kobak is dealing with, he's not saying that's dollar-for-dollar shortfall because it's not -- if that's the case, it's not otherwise giving credit to the fact that, you know, just for Your Honor's own information, it's not giving credit to the fact that LBI apparently did have an excess in their calculation. It's not really such a concern for Barclays because, again, we have our reservation of rights, but in the interest of completeness, I though you would want to know that.

THE COURT: All right, we're throwing around a lot of numbers. Mr. Kobak, other than the reservation of rights, the question seems to be whether or not the alleged shortfall does or does not take into account the purported balance of approximately 1.2 billion based upon what counsel said.

MR. KOBAK: We don't necessarily agree that there was a balance of 1.2 billion dollars or a balance of anything that was excess, truly. There were some calculations to that effect by some of the LBI personnel at the end of Lehman's existence before the liquidation. There were also some calculations that used much different figures. We will be coming back to the Court with respect to what we consider the core property to be

that we start with before the allocation, and as I said, before we make distributions, we'll come forward with a schedule and an analysis which will demonstrate what it is we think was in customer property, what we're adding to it and so forth. So I would suggest any dispute about this would be appropriate at that time and really isn't an issue today. The principle today is that these four items that happened to total 2.1 billion are properly allocable doesn't really decide what the total amount of customer property is at this point.

THE COURT: Fine. Look, this is a work-in-progress, that's apparent. And there's a lot of money involved and there are a lot of financial institutions whose interest are affected by the allocation judgments being made by the trustee. The matter which is before me this morning is, at this point, uncontested. I think the record's pretty clear that it is a consent order. We're not having an evidentiary hearing, and I'm not making findings of fact in reference to any items that may be in dispute or as to which any reservation of rights may apply.

MR. KOBAK: That's correct, Your Honor.

THE COURT: So for that reason, I don't think I need to get into the question of accounting for what was or was not the right number for the reserve account, and anything that's been stated on the record is just that, no more than colloquy.

MR. KOBAK: Good. Thank you, Your Honor. Unless Your

Honor has question, I'm done.

THE COURT: No, I don't, and I'm frankly very pleased that the parties have been able to work so constructively together to reach an agreed order, and I think that the process which you have outlined which calls for ongoing consensual behavior is a way to deal with this difficult issue makes a lot of sense, and I'm happy to approve the order.

MR. KOBAK: Thank you, Your Honor. Mr. Chamie will now present our position on the Fifth Third Fund.

THE COURT: Oh, and before he does, while I say I'm happy to approve the order, it's clear that I will need an order.

MR. KOBAK: Yeah, we will submit one at the conclusion of the hearing.

THE COURT: Fine.

MR. CHAMIE: Good morning, Your Honor. Ramsey Chamie of Hughes, Hubbard & Reed on behalf of the SIPA trustee.

THE COURT: Good morning.

MR. CHAMIE: I will present for the trustee, and then Mr. Caputo would like to present SIPA's view after.

The trustee respectfully moves for an order upholding the trustee's determination and expunging the objection related to the claim of Fifth Third Structured Large Cap Plus Fund. The issue now before the Court is choosing the proper date to value short positions held in a customer account. The

trustee's position is that short positions are to be valued on the filing date as mandated by SIPA. This is how indebtedness has to be valued for all net equity claims, and this is what the trustee did. On the filing date, Fifth Third had short positions that were worth 40 million dollars. This is the amount Fifth Third owed LBI. The trustee's use of the filing date is consistent with the treatment of all participants in the trustee's prime brokerage protocol. It is also consistent with the trustee's treatment of all customer claims. Most important, it's the only approach consistent with the net equity definition.

Fifth Third wants the trustee to value its short positions on another date in March when they were worth 22 million dollars. The difference between the value of the shorts on the filing date, 40 million, and in March, 22 million, is 18 million dollars, the disputed amount. Pursuant to a settlement agreement reached in the customer account transfer process, Fifth Third paid the 22 million in partial satisfaction of its debt, and the remaining 18 million was placed in escrow. Fifth Third received one hundred percent of its assets as of the filing date. The 18 million in escrow was Fifth Third's remaining debt. If the Court agrees with Fifth Third's argument, it would not owe the 18 million dollars to the estate. If the Court agrees with the trustee's and SIPC's reliance on the filing date which is mandated by SIPA, the 18

million will revert to the estate.

There is no other dispute between the parties. The parties stipulated facts, and the only remaining question is the legal issue presented by this case.

Using the filing date to determine a customer's net equity is a hallmark of a SIPA proceeding. It provides certainty and ensures fairness to all customers. In a SIPA liquidation, all customers share ratably in the fund of customer property. Any attempt to recover postpetition damages from this fund is at the expense of other customers. SIPA prevents this by mandating that all customers are treated equally by determining their net equity as of the filing date.

THE COURT: Okay, let me break in. I realize you have prepared remarks, and you're following something of an outline. But I have a question about an aspect of this case which I just want to bring to your attention, and in effect, to the attention of other parties as a matter I'm puzzled about.

As I understand the transaction that we're dealing with, because of the status of this market participant, its arrangements with LBI included State Street Bank as a third-party custodian that held collateral. To what extent is the tripartite aspect of this transaction a distinguishing characteristic that I need to take into account in respect of evaluating your arguments as to the importance of September 19 as a day and the arguments of the claimant that in effect, this

is a distinguishing factor, that's a question that I'd like to hear more about from the parties in their argument because at some level, both the trustee and SIPA are making a relatively-speaking simplistic argument. Your argument is it doesn't matter if there are Bankruptcy Code provisions relating to securities contracts and other safe-harbored instruments because the Court properly can ignore them or disregard them for purposes of proper administration of a SIPA case. In effect, the filing date trumps everything else. But my question is, is that true and should it be true in a setting in which we're dealing with what I'll call a hybrid, a situation which is not a pure customer claim where the assets are in a third party's hands and where we have Code provisions that so clearly are designed as a public policy matter to protect financial participants. That's my overlay to what you've said in prepared remarks, so you should be prepared to deviate from your prepared remarks to respond to what I've said at any time that you want. But I want you to know how I'm thinking about this.

MR. CHAMIE: Right. We would agree that the use of equity not only is how it should be treated in this case, but in fact, that's what is mandated. With respect to the tri-party arrangement and this special agreement, there's nothing in that that's inconsistent with SIPA's definition of customer property. Under SIPA, customer property is defined as cash and

securities any time received, acquired, or held by or for the account of the debtor for securities accounts of a customer. And in this situation, there was a tri-party arrangement and the securities were at State Street, but they were under the controlling dominion of LBI. And Fifth Third had a customer account agreement which established a customer account at LBI that received customer statements from LBI. It filed a customer claim and it benefited from a customer account transfer process. So we feel that there's no reason to treat the assets in this case differently than other assets. And in addition, there were many prime brokerage customers that had securities at various depositories including State Street or Chase or DTC, and we see no reason why this should change the analysis of their net equity on their customer claim.

With respect to the provisions of the Code that you've mentioned, we don't dispute those provisions, and we think the trustee has allowed parties holding property to use these provisions without objection. But these provisions relate to damages, and to allow Fifth Third to recover damages from the fund of customer property would come at the detriment to other customers. At best, these provisions would allow a general creditor claim in this proceeding.

Fifth Third makes two arguments why its short positions should be valued on a date other than a filing date, and I think we've touched on both of them already, the first

being the Bankruptcy Code provisions, which we don't dispute. Again, we believe that these provisions relate to damages. The claims to damages are at best general creditor claims, and the amendment to SIPA that they reference in their brief which is 78eee(b)-2(C) provides an exception to the stay that allows financial participants to exercise certain contractual rights. Congress never amended the definition of net equity, and --

THE COURT: Might that have been a mistake?

MR. CHAMIE: No, there's no reason to believe that that was a mistake at all.

THE COURT: Well, one of the things that occurs to me, and I just -- I realize that's the right answer to my question, but one of the things that occurs to me is that we have a very complicated regime in SIPA and a very complicated regime in the Bankruptcy Code, and for purposes of this SIPA liquidation proceeding, I look at both statutes. The amendments that took place in 2005 suggest an intention on the part of Congress to liberalize and clarify safe harbor provisions that are the subject of active litigation throughout the Lehman bankruptcy cases that have never before been litigated. Today's case, to the best of my knowledge, is completely unprecedented in that we are interpreting and attempting to harmonize provisions which appear not to fit well together. I would like you to comment as to why I should look at SIPA as the predominant statute as opposed to the Bankruptcy Code where both sets of

provisions appear designed to deal with issues of importance to the integrity of the securities markets, generally.

MR. CHAMIE: Well, in the first instance, under SIPA 78fff(b) it says that the Bankruptcy Code should be applied to the extent that it's consistent with SIPA. We don't believe that these Bankruptcy Code provisions are consistent with SIPA's treatment of customers. To allow a customer, one customer, to benefit from certain conditions and, in essence, not repay its debt would create shortfall for the other customers. And we don't think that this is allowable under SIPA or in line with SIPA's underlying policies and goals.

To the extent they have a claim for damages under securities contracts as financial participants, the trustee believes that at best, they have a general creditor claim, and that would, in essence, harmonize the Code with SIPA.

THE COURT: Okay.

MR. CHAMIE: One or two last points, Your Honor, and then I'll cede the podium to Mr. Caputo.

With respect to the customer property issue, Fifth Third has raised this argument that their property was segregated and identifiable. It should be noted that these concepts were written out of the statute by Congress over thirty years ago; the 1978 amendments removed the concept of specifically identifiable property. There's really only one exception that exists for property that's not considered part

of the estate, that's customer name securities, which are securities registered in the customer's name in non-negotiable form. The securities at State Street were not -- in fact, even if they were, they would still have to pay the debt before the release of the customer name securities. It's undisputed here that this case does not involve customer name securities.

One final point is that the trustee believes it's his responsibility to administer the liquidation over the estate in a manner that benefits all customers, and not just Fifth Third, and he's tried to do that here. For this reason, we ask the Court to uphold the trustee's determination of Fifth Third's claim.

At this time, unless the Court has any further questions, I will turn the podium over to Mr. Caputo of SIPC.

THE COURT: I do have a question that doesn't go directly to your argument, but rather to the potential significance of a finding here to the liquidation on an overall basis. To what extent are the issues presented in the Fifth Third dispute issues that have application to other claims by financial participants, and to what extent does the outcome here have a material impact upon the overall realization of customer claims within the liquidation itself?

MR. CHAMIE: It's difficult to put a monetary value on the impact of the decision that customers with short positions could, in essence, value their shorts and their customer claim

at the date of their choosing. Simply, that addresses the problem with that argument which is that it would create uncertainty, which is something that SIPA tries to minimize. We've done a preliminary analysis, and if all the customers with short positions were to value, hypothetically, their shorts on the same date that Fifth Third has chosen, it would create a shortfall of approximately 190 million dollars in the estate, in the fund of customer property.

THE COURT: Now, the date that appears to be a relevant date solely for purposes of this dispute arises out of the settlement agreement that the trustee made with Fifth Third.

MR. CHAMIE: That's correct.

THE COURT: Otherwise there would be no March 2009 date. The date is solely a function of the circumstance of the parties getting together and documenting something as of a certain time in March, correct?

MR. CHAMIE: That's correct, Your Honor. That's the time the settlement agreement was entered.

THE COURT: One of the things that I noted in the papers and I'm not making too much of it by asking the question, but I do have a question about it, is whether the trustee contributed to this problem by refusing to consent to a transfer of the prime brokerage arrangements with LBI in a more timely way to some third party. And reading between the lines

and actually reading the words, there is a suggestion that this was something that could have been solved earlier in a commercial way but, for whatever reason, was not. To what extent is the delay something that's chargeable to the trustee?

MR. CHAMIE: Well, the trustee issued the prime brokerage protocol for the transfer of prime brokerage customer accounts on October 6th. I believe the revised version was issued on October 14th. In that process, we transferred approximately 300 accounts with over 3 billion dollars. Parties that sought to avail themselves to the protocol -- it was a consensual process. We're confined by the terms of that protocol. And in the account transfer provision of SIPA, it says that the trustee can transfer accounts under terms satisfactory to the trustee with prior approval of SIPC, which we had in this case. We transferred the entirety of this account except for the disputed amount, as I said earlier, which is one reason why we believe this is a good test case in this case. The only issue that we have, in essence, is whether they need to pay the remainder of their debt as of the filing date.

So as to whether the trustee contributed to delay, I would say no to the extent that the terms of the protocol set forth very clearly that short positions would be closed on the 19th. To the extent that a customer chose to disagree, we tried to minimize the impact by releasing the securities from

State Street and reducing the entirety of the claim down to the disputed amount.

THE COURT: All right, thank you.

MR. CHAMIE: Thank you, Your Honor.

THE COURT: Good morning.

MR. CAPUTO: Good morning, Your Honor. Kenneth Caputo on behalf of the Securities Investor Protection Corporation. Your Honor, a couple of points. First, your question with regard to whether it's proper for SIPA to trump the Bankruptcy Code as a general rule, and the answer, I think, is found in a strong statutory basis in SIPA itself. The statute is clear and unambiguous. And it says that to the extent consistent with the provisions of SIPA, chapters 1, 3, 5, and subchapters 1 and 2 of chapter 7 of the Bankruptcy Code apply. But that's only where it is consistent with the remedial purpose of the statute. And the remedial purpose of the statute is clear for more than thirty-five years of jurisprudence that all customers are to be treated on an equal basis. So if the Fifth Third's argument were to be correct, then what you're -- what the conclusion would be is that a mere exception from stay for the ability to take certain actions postliquidation would, in a sense, create different classes of customers within that statutory term. It's hard-pressed to believe that Congress made a mistake and inadvertently created separate classes of specially-protected customers.

THE COURT: It's quite possible they had no idea what they were doing.

MR. CAPUTO: It is. But the outcome is entirely consistent with case law and with the public policy and the remedial purpose of the statute as envisioned by Congress in the legislative history and with the amendments to SIPA that have been imposed at various points along that thirty-five, now forty year chain, most specifically in 1978 which gave the trustee the ability to transfer accounts like here, transfer over an account to benefit customers equally, like Fifth Third, in a bulk transfer on conditions that satisfy the trustee and SIPC. And the reason that's so important, and the reason Mr. Chamie made reference to the protocol, which I think was done in a fairly expeditious fashion in this case, in October -- remember, this was an incredibly difficult time, as I'm sure this Court is well aware and reminded of continually. But at the same time, the trustee was asked to come in and assume the role as the leader of perhaps the fourth or fifth largest investment bank in the United States. And he did so and then expeditiously issued guidelines for the transfer of accounts which were done on a voluntary basis, but using the date in SIPA that has been uniformly applied, and that's the filing date. To a certain extent, more than 300 prime brokerage customers took advantage of that. And the received their property, they valued their positions as of the filing date,

and they're, you know, I think probably quite happy today that they're out of the mess. Fifth Third did not. It chose to continue to blame the trustee for not carving out special exceptions for each various financial participant as opposed to dealing with all customers on an equal basis, I think would be to lay blame where it is not properly laid.

Now, I want to get to two other points. One is the characterization by Fifth Third in their own words that they're some sort of specially-protected party. And the other is their assertion that there's confusion because SIPA was amended in 2005 and net equity was not. So Fifth Third states at various points in its brief, pages 19 and 21, for example, that it is this -- and their words, "specially-protected party". For example, it states that "regular" customer claims for cash and securities are, indeed, net equity claims, but that certain securities contracts with specially-protected parties like Fifth Third get special protection. It also argues at another point that the stay added to SIPA in 2005 ensures that specially-protected counterparties to securities contracts get to, you know, exercise rights of setoff and netting out post-filing date.

This notion or suggestion that SIPA provides for some other specially-protected group of creditors is, frankly, a notion crafted out of whole cloth. It finds no support in the statute or in the legislative history, and Fifth Third has

cited none and can cite no support for that proposition. Their argument that the exception from stay necessarily includes a calculation of damages based upon the termination date or rejection date, as opposed to the filing date, runs counter to, among other things, the express plain language of the statute where filing date is used more than a dozen times as a marker for various actions that the trustee must undertake, the purpose behind the investor protection scheme in SIPA, and frankly, the well-reasoned and properly applied public policy of providing equal protection to all customers of the debtor.

There are two classes of creditors in a SIPA case. There's general creditors, and there's customers, and that's a defined term. As the trustee has argued, Fifth Third would very much like and very much did enjoy the conclusion that it was a customer of the debtor. That enabled them to file a customer claim and receive priority attention in this case. In fact, it afforded them the opportunity to receive the benefit of their allowed claim at this point in time. Only customers get that. But only now that we have this disputed amount which they are going to characterize in a few moments, I can tell you, as just merely excess collateral, they want to retreat from the conclusion that they're a customer. Only now that we get to this point. It was a terrific idea all along as long as we were treated specially and in priority, but now, they make the argument, oh, we're not a customer at all. In fact, we

don't even belong in this estate. To get to the point about the tri-partite relationship in that regard, if that were true, they should go to State Street and get their assets. But they can't because the account is opened at LBI. That's where they signed in a customer agreement. The account at State Street is entitled "LBI as designee". They can't go to State Street and get their assets, no more than any other prime brokerage customer could come in and say, you know, my money's at DTC in a separate box; I'm going to go get it. Or, my money's pledged to Chase. Oh, in fact, it's at a segregated account at Chase. I'm going to just go get it, and I don't have to be part of the liquidation proceeding because I'm special. There's no case law in the land, and to impose this statute fairly to protect customers, you could no sooner get to that conclusion by imposing SIPA in any way, shape, or form.

So, essentially, when LBI failed, Fifth Third had a valid debt to LBI. Had some long positions, got the benefit of those, but it also had a debt. And so while it could, post-filing date, continue to exercise certain rates to the extent possible, it still had to satisfy that debt. I think we all agree on that, that's the disputed amount, the debt. But their argument that it could close out its debt at a date of its own choosing postfiling runs counter to the main focus and intent of the statute, and that is that the trustee is a liquidator. He must as promptly as possible return property to customers.

That's his duty. It's specified in the statute very clearly, his primary purpose. He's not a substitute broker who must, or frankly, even can continue to run the broker-dealer's operations, perform mark-to-market calculations as they would have the trustee do with regard to their positions on a daily basis, or engage in securities transactions after the filing date. He cannot do that. In fact, the statute, SIPA Section jjj(b) --

THE COURT: You're the only person who can do that on the run.

MR. CAPUTO: Thank you, I've had a few days of practice on that one. The -- expressly prohibits the trustee from doing that. It's an express provision in the statute; it's plain. He cannot run the broker-dealer. And SIPA, frankly, is entirely clear and consistent, as I said before, in its use of the filing date throughout the statute. There's more than a dozen references to filing date in that statute as the date for valuation. Not some other date that a special customer gets to choose, and not just for some customers, and not just for regular customers, as they say it, or not -- as opposed to special customers.

We don't dispute much of what they've said in their brief. There were amendments to the Bankruptcy Code. There were amendments to SIPA in 2005. It permits specially-protected parties like financial institutions to engage in

certain rights postfiling. Those are well-imposed, well-intended amendments. They permit these parties to the extent possible to carry on with certain activities like netting out positions. But to the extent that they -- any party, Fifth Third or any other -- seeks the return of property from the estate that's under the dominion and control of LBI, that do so as either a customer or a general creditor. And there's no third class, no superpriority class of creditor that's entitled to somehow, A, receive the benefit of the return of their property pursuant to a customer claim, but B, not be subject to the constraints and statutory parameters that every other customer is subject to. Their argument that they're a special party has no merit as a matter of law.

Now, the second point involves the plain language of SIPA and how a claim is to be satisfied, notwithstanding the amendments. As I've already said, you've got two classes of customer: you've got the customer and the general creditor. There's no dispute that SIPA was enacted and is intended to provide priority protection to the customers, as opposed to general creditors. So in order for a customer to get back their property, they can either do so via a bulk transfer, which was done in this case, or via a customer claim, which is what Fifth Third has done. Claims are paid under SIPA 78fff-2(b) which provides that the trustee shall discharge his obligations by the payment or delivery of net equity claims of

those customers. Net equity, as the briefs made clear, is essentially a common sense provision. It's what the debtor owes the customer minus what the customer owes the debtor. Pretty simple. We think that's pretty straightforward.

When Congress amended SIPA in 2005 along with the Bankruptcy Code to add to SIPA exceptions from stay that we all agree allow financial participants to do certain things, it didn't amend net equity which controlled how a trustee is to determine and value -- the essence of this case, a valuation case -- what a customer is owed and what the customer owes the debtor. Fifth Third says that this argument is somehow confusing. We don't think that's confusing at all. We, too, think it's pretty straightforward. In other words, while Congress, by the amendments, intended Fifth Third or other participants to engage in activity that would afford them the opportunity to act with regard to certain positions that they may have, it didn't intend to permit them some wholly separate means of calculating what they might owe the trustee or what they are owed the trustee as of the filing date. It just did not change the valuation terms. They are equal to every other customer who share on a pro rata basis. There's no two pro ratas in SIPA. The longstanding and well-settled concept of providing customer protection to all customers equally or on an equal basis was appropriate left untouched.

Finally, were Fifth Third to be correct and be

permitted to close out its permissions at a date of its own choosing, it and other financial participants would have the benefit of choosing the date upon which to value their claims as opposed to all other customers who would be stuck with the filing date. There is nothing in SIPA, there is nothing in its legislative history, there is nothing in the legislative history to the amendments at issue that even suggests that, and any suggestion of it runs very clearly, I think, counter to the well-crafted public policy of protecting all customers on an equal basis.

Thank you, Your Honor.

THE COURT: Thank you very much.

MR. KIRBY: Good morning, Your Honor. Richard Kirby from K&L Gates on behalf of Fifth Third.

In answer to the question that the Court posed at the outset, it's our view, first, that this -- that the existence of the third-party custody account is important and it presents an important difference between the position of Fifth Third and even potentially other similarly situated, what I would refer to in the papers as specially-protected parties. And --

THE COURT: Let's stop for a second because there's some controversy about the whole notion of specially-protected parties. What do you mean by that?

MR. KIRBY: Okay, I think what is meant by that is found in the statute, and it is because of what Congress has

carved out in various provisions of the statute, 555 and specifically, but in -- the key provision is the exception to the automatic stay that authorizes, basically, 5 by 555, which is in 362(b)(6), which is an exception to the automatic stay which applies not only in bankruptcy cases but, what my colleagues refuse to acknowledge, applies equally in SIPA proceedings which triggers --

THE COURT: What is it --

MR. KIRBY: -- the 555 rights.

THE COURT: Excuse me for breaking in, but what is it about having certain rights to disregard the automatic stay that should have any impact in respect of claims in a SIPA case?

MR. KIRBY: Okay, I think it really goes to this point. In order to understand what those statutes mean, you have to understand -- and the facts are stipulated -- what the party's rights were on the date of the petition, okay? And those rights were, with the open securities contracts, that these -- it's stipulated that the collateral and margin that was pledged at the third-party custodian was to be adjusted on a daily basis. Number two, their agreements require that these contracts be marked to market daily. Number three, that each day, when those were marked, the custodian, the third-party custodian, to the extent there was excess collateral, would pull the collateral out from the main overriding third party

custody account where Fifth Third kept its assets, and segregate those assets as pledged to LBI. But the flip side of that is if the securities prices went down, the third party custodian was required to release excess collateral from that segregated account. But most important, what the contracts provided -- and again, this is stipulated -- is that any party had the right to terminate that contract at any time by simply delivering the cash and securities. Either side could effect that termination. And what those rights -- the exercise of those rights or what's preserved in Section 555 and the other provisions, and Your Honor, look, I've practiced bankruptcy law for a long time. These provisions are unique, they're unusual. It's not the kind of provisions that most of us get involved in in an ordinary bankruptcy. Frankly, as Your Honor admitted, these are provisions which few, if any, courts have had an opportunity to address.

We have prepared, and I think it would be helpful, copies of some of the selected statutes, which I would offer as a hearing exhibit. We've highlighted them and what I would propose is to hand this to the Court, and I would like to walk the Court through a couple of those provisions. Ii think it's important and instructive to focus on those provisions in order to answer the question that you asked, why is my client a specially-protected party. May I hand this to the clerk?

THE COURT: Sure. Oh, I need to actually get it.

MR. KIRBY: Oh. Your Honor, what I'm going -- these are just a compendium of various statutes, and I will just refer the Court to the index. They're just some selected provisions of the provisions that we've discussed in our brief. But what I'm going to ask the Court to do first is refer to tab 4, which is an excerpt and reproduction of the 362(b)(6) statute. And what's important on that point is to focus on the language of the preamble to 32(b) which says "the filing of a petition" -- of course, this is a Bankruptcy Code provision -- "or of an application under SIPA does not operate as a stay." And then focus on the language that we bolded here. Under subsection A, "of the exercise by a financial institution, financial participant of any contractual right" -- now, again, I just went over the Court, what the parties have stipulated is the contractual rights -- "as defined in 555 under a security agreement or arrangement forming a part or related to any securities contract or contractual right as defined in 555 to offset or net out any termination values". That's excepted from the automatic stay. That means parties are allowed to continue to do that for the things that I discussed, what the parties have stipulated to, mark-to-market, continues because it's accepted from the automatic stay. The third party custodian was required to continue to do that.

Now, let's look at tab 6 which is the 555 provisions. It says, "the exercise of a contractual right of a financial

institution/financial participant". Again, this is what we're referring to as the specially-protected parties, the party -- they have stipulated that my client, which is a registered investment company, qualifies as one of the -- both a financial institution and a financial participant.

THE COURT: Okay, I don't think there's any dispute about that, then.

MR. KIRBY: Okay, but I think it's important, Your Honor, to focus on what they're allowed to do as a result of that because remember, this is the thing that's excepted from the automatic stay in 352(b)(6), which is "to cause the liquidation, termination, or acceleration of a securities contract," again, as defined in 741 of this title and the parties have stipulated that what these contracts were, securities contracts, "shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or order unless such order is authorized under the SIPA". Okay?

Now, that's what really triggers the importance of the -- and it's under tab 1 -- of the amendments of 2005 that were clarified. Which, I refer you to tab 1, which is the Section 5(b) of the SIPA, as my colleague, Mr. Caputo, of course, says, it's 78eee(b). But I don't remember those without looking at them. But the exception to the stay which is in (c) which says, "notwithstanding anything under 362, an

application under (a)(3) of this section" -- which is a SIPA application -- "nor any order decree obtained by SIPA shall operate as a stay of any contractual rights of a creditor to liquidate, terminate, accelerate securities contract". Or master netting agreement, and I want to refer this, "or master netting agreement to offset or net termination values or other obligations arising under one or more contracts".

The point of this, and, you know, I have reproduced also for the Court and I will take the time if you like, but the provisions of 561 are also there, and 562. Each of those provisions recognized that these contracts have a life beyond the bankruptcy. Now, what does that mean for the Court, and what does it mean in this context? How does that interact with the SIPA net equity provision? That's the question that my colleagues pose. Do these provisions amend, modify in some way the definition of net equity? The answer is that the SIPA statute has to be looked at in its entirety, as a whole. And I emphasize that because as the Court is well aware, there is major litigation in another SIPA case involving the Madoff matter. On the question of what does net equity mean, and the dispute in that case is the question of whether net equity should be calculated on the filing date based upon the documents that the various customers got, or, as SIPC has argued, based upon the other language in the statute which looks to define what those security positions mean, which is by

reference to all the books and records of the debtor. And Your Honor, I will ask the Court to take judicial notice of the SIPC trustee's papers as filed in the Madoff matter on this very point which really brings -- okay, Your Honor, I advised my colleagues that I would ask the Court to take judicial notice of this brief. May I hand it to you?

THE COURT: You can hand it to me.

MR. KIRBY: And what I would ask you to refer to is footnote 4 of this brief, which essentially states our position as well as we could possibly state it. It's been highlighted on page 6 of the brief. And what that says is that in order to interpret SIPA, you have to look at the statute as in its entirety.

THE COURT: Okay. I've looked at it.

MR. KIRBY: Okay. What that means is that -- what apparently Congress intended and for good reason -- and I want to emphasize the point as to why were these statutes added in 2005. There's little reference in the legislation issue to replace it in our papers. What they did not want to have is large financial institutions, like my client, which is a registered investment company, which is a fiduciary, for public investors. We're not talking about a hedge fund or some entity which has administering assets or administering money for a bunch of high-net worth accredited investors.

We're talking about a registered mutual fund with

people who's invested their 401ks and other things in that. They did not want to have these kinds of financial institutions to be hung up in a liquidation proceeding like this for this precise purpose because what's happened to my client is because these assets have been tied up, they've not been able to administer those assets.

Even as we seek -- I mean, we were able to negotiate a limited settlement agreement in March of last year but we are now a year later and the assets that are -- that we believe are -- were properly -- if it was properly entitled to under the statute, are hung up in litigation over whether we were entitled to exercise with apparently on the face of the statute from mid -- rights, which would, on the face of statute, would permit.

Now they say, "well we entered into this protocol which said if you value them the way we want to, we'll agree to transfer the balance of the assets" but that was a consensual process. We said no. We said that these statutes provide special rights. They would not address those except, you know, here we are, eighteen months after the commencement of this case, discussing the issue of what the statute would, apparently on its face, allow.

THE COURT: Can I ask a question?

MR. KIRBY: Yes.

THE COURT: Based upon your reading of the safe harbor

provisions as applied to your client, could you have taken action to close out these open short positions in October of 2008?

MR. KIRBY: We tried. We've requested the trustee to consent.

Second, what we said to the trustee was "if you would not consent, we would like to have a proceeding before Your Honor to force the issue". What they said is, "If you seek relief like that, we will seek contempt against you."

THE COURT: What do you mean, "if you seek relief"?

MR. KIRBY: Well, we asked --

THE COURT: Is it your position that you need to ask permission to exercise rights under these provisions of the Bankruptcy Code, which you have just shown me at great length or are they automatic and self-executing? So that if you are a special entity, such as you claim to be, you can simply do it. Why do you need any consent from the trustee? Why do you need any relief from this Court? If you do, you're not so special.

MR. KIRBY: Well, Your Honor, the answer to that is that they're under the third party custody agreement. The trustee needed the consent to the release of the excess collateral. And so absent that consent, we needed to -- we needed to commence the proceeding. What we could've done at an earlier time, was commence an adversary proceeding in this court to compel this issue at an earlier time.

THE COURT: Well here's what I'm not understanding -- because you've made much about these statutory provisions and I'm actually quite familiar with them, as you may be aware. If you have a right to exercise relief without regard to the automatic stay or you don't --

MR. KIRBY: Right.

THE COURT: If you're telling me that the right that you have is conditional and that you needed the trustee's consent, then of what impact -- what impact should I draw from your reference to a statutory provision that's not self-executing?

MR. KIRBY: It rises from the question that the Court posed in the first instance. What are the terms -- does this case turn on the issue of the third party custody -- peculiarity terms of the third party custody arrangement between the parties?

What that third party custody arrangement provided was that -- now as a registered fund, my client segregated its assets at State Street. What they -- the special arrangement was that State Street would segregate, in a separate account, collateral and margin -- two times the collateral and margin required for the short positions.

In order to release those assets, what it -- State Street required that not -- the consent of the trustee. In addition, my client could demand it but only if the trustee

would consent. The trustee put us in a Catch-22 situation by saying, "We will only consent under -- except under the terms of the protocol."

And that is why we are here today because once we closed out the positions as defined in the third party custody agreement, which we have placed before Your Honor -- under the terms of that agreement, that became excess collateral. And we were entitled to that property under the third party custody agreement. That is the reason why we have sought the relief that we've sought.

Now, whether it should be part of a claims process or part of an adversary proceeding, it's always been my position that -- except for the fact that the trustee said that "Look, if we stipulate to the facts, we can have the Court decide this question through the claims process." I deferred to the trustee on that but our position is that that collateral belongs, under the terms of the party's agreement, as property of Fifth Third.

And as a result of that, that means we're entitled to that amount. That dispute -- the statutory rights are self-executing. The party's peculiar third party custody arrangement is the one that said we need the consent of the trustee -- or the permission.

THE COURT: All right. Well, then -- I'm a little confused and maybe you can clear up some of my confusion. If

the provisions that you rely on in order to seek special treatment relative to your customer claim entitling you to the eighteen million dollars which is in dispute -- which eighteen million dollars flows from your having gone into the market in March of 2009 -- if that argument is based both on code provisions that would otherwise entitle a qualifying financial participant to exercise rights and remedies without regard to the automatic stay and a custody agreement, which limits those rights, haven't you undercut your argument with respect to the safe harbor provisions because your very contractual arrangements require you to wait and obtain consent?

MR. KIRBY: We can -- under the contracts, we can -- I mean, if they don't -- if they wrongfully withhold consent, which is where we believe the position is, then we would have to go to court and seek enforcement of our rights under the contract. It's our view that, under the terms of the third party custody arrangement, they were wrong in withholding that excess collateral.

THE COURT: So why does that affect, in any respect, your rights as a customer in the SIPC liquidation proceeding? And why does that affect, in any respect, the relevant date, which for SIPC purposes is September 19 and for your purposes, purely as a matter of circumstances, is a date in March of 2009 because that's when you entered into a stipulation?

MR. KIRBY: Your Honor -- and the answer to that

question, the way to view it is this. If we had never filed a customer claim, what we would have done is we would have brought an adversary proceeding to compel enforcement of our rights, which -- what -- and that's -- we believe that we -- what we did was we sought a customer claim but in our customer claim, we made it very clear that the relief that we were seeking was release of the -- the trustee's consent to release of the excess collateral in the dispute -- in the third party custody arrangement, which they held and couldn't -- they refused to release, absent their consent.

So, the procedural postural we found ourselves in, was do we commence an adversary proceeding -- we sought to try to work it out. Once we realized that we could not work it out, we entered into a limited settlement agreement, at least to the narrow the scope of the issue and frame the issue properly the Court.

But where we are, is that we would have commenced an adversary proceeding to seek to enforce our rights under the third party custody arrangement, which was that it requires the trustee to consent to the release of that -- what's excess collateral now because of the termination of those contracts. And the key point there, Your Honor, is that my client was required as part of the prearrangement was to keep twice the amount of collateral it needed for the contracts.

So once -- which was the collateral for the short

position which was the borrowed stock plus the federal margin requirements which was an additional one time and that's what the party's prepetition arrangement was. Once that -- those contracts were terminated, the trustee -- we paid the trustee the amount which was the collateral it was entitled to under the prepetition arrangement of the parties, which was the value of the securities and the margin, which should -- under the third party custody arrangement, should be released.

That's -- that is what we're after, which is the collateral -- which was defined by the parties as excess collateral. And I -- you know, I submitted the third party custody arrangement as part of the record. I can show you the provisions in that arrangement which is -- describes what that is.

THE COURT: Well that custody arrangement was submitted, if I recall correctly, in the context of the disputed procedural ploy on the part of Fifth Third, which was the motion for summary judgment. And there's a motion to strike that which is also before me today.

MR. KIRBY: That's correct, Your Honor.

THE COURT: So, while I understand that that agreement is part of the record you would like me to have, I'm not presently treating it as part of the record.

MR. KIRBY: I understand but understand also that -- and we can address that at that -- on that motion but Your

Honor, understand --

THE COURT: We'll get to that when we're done with all of the --

MR. KIRBY: But I do think that -- I think it's important on that point which is that the stipulation of the parties refers to a document which is material to the case. And it clearly, by any normal understanding, would have been incorporated by records. The parties referred to the third party custody arrangement in the stipulation. We simply submitted it to the Court to -- so that the Court would have that in order to review and understand something that's been stipulated to the parties. There's no dispute of what the third party custody arrangement was.

THE COURT: Okay. I'm not reading that document today for purposes of -- to -- that the argument but it's clearly not disputed by the parties that that agreement, fairly read and construed by both parties, included consent rights for the trustee as successor in interest to LBI.

And as a result of that -- and this is really what I'm struggling with in your argument. It seems to me that the delay associated with the closing of the open short position, which is really at the bottom of this dispute, has very little to do with the safe harbor provisions of the Bankruptcy Code. And your protected status, as you argue it in reference to 555, is a -- almost an irrelevancy because even though you have that

status, you couldn't exercise rights with respect to it because of the custody agreement that you admit forced you to wait.

MR. KIRBY: It doesn't force us to wait. What it forces us to -- what it -- and this is where I think there, you know, may be some confusion --

THE COURT: That's -- I told you I was confused earlier.

MR. KIRBY: Okay.

THE COURT: If you can --

MR. KIRBY: The third party custody --

THE COURT: If you can clear it up, that's great.

MR. KIRBY: Okay. And I cannot do that without reference to the third party custody arrangement but what those -- that provision -- what those provisions provided was that the collateral, at all times, will be property and remain property -- remember, this is just -- this is a security arrangement.

So the property is Fifth Third property under the terms of the custody arrangement. But as one would expect in a third party custody arrangement, if there is a dispute about which -- what is the amount of the pledged amount, then -- and each -- under the terms of the third party custody arrangement, each day the collateral was, as I described and as the facts are stipulated to, each day the parties would have adjusted the collateral that either the collateral would be moved out of the

segregated account or moved into the segregated account depending on the value of the securities.

So, when the trustee takes the position in his protocol that all know will only value these on the date of the filing but the statutory exceptions say that not all these contracts -- these exercises -- these rights which I've described and the parties stipulated to, such as marking to market the margin requirements and adjusting the collateral, those rights continue. What we demanded of the trustee from the beginning, which is either transfer our account or release the excess collateral which is provided for in the separate agreement. The trustee says, "No we will not unless you consent to valuing these contracts as of the filing date" but that -- you know, that is the rub of the dispute. That is why the dispute really turns on what are the statutory exceptions because the trustee refuses to acknowledge that those are amendments to SIPC.

THE COURT: Well here's one of the problems I'm having with your argument and you might as well know it so you can respond to it.

MR. KIRBY: Fair enough.

THE COURT: As I'm understanding the statutory exceptions, they become a convenient way for you to argue that there is an ongoing right beyond September 19, 2008 which is statutorily sanctioned but in point of fact, it seems to me

that that right is, here, irrelevant because it hasn't been exercised. It was exercised pursuant to a stipulation which could just as easily have been entered into by the parties without regard to the exceptions of the Bankruptcy Code.

Assuming for a moment that the automatic stay applied to your transaction and that you were to argue that you are being adversely affected by your inability to realize the value of your collateral and so you are denied adequate protection, you could have moved on an expedited basis for stay relief and had, in March of 2009, entered into the very same stipulation which led to this litigation. That is hardly an argument for disregarding September 19 as the operative date for purposes of determining customer property claims.

So the problem I'm having with your argument is that while it's facially interesting, based upon the custody agreement that you want me to read, all of those provisions are fundamentally irrelevant to what happened to you. Fifth Third waited and never had, by its own admission, the ability to exercise rights promptly in October, November, December or January, despite best efforts. That's my problem with your argument.

MR. KIRBY: The answer, I think, Your Honor, to that -- to the dilemma that you posed is this. If what we were seeking was customer property claim, the situation would be very different. We are not -- this matter arises in the

context of a claim dispute because we accepted the SIPC position that this dispute could be resolved as part of the claims process. But if it cannot, then the alternative for our client is -- and -- is to have an adversary proceeding to recover property that belongs to it under its contracts.

And so, what we view this proceeding before the Court now is adjudicating the rights on all sides of the parties with respect to the disputed amount, either as part of the claims process or that's the reason for why we brought the motion for summary judgment which is so that the Court would have a procedural vehicle to address the issue that -- which we believe is the true issue in the case, which is that that third party custody arrangement is -- permits us under the facts of this -- that are stipulated to, to an order directing turnover of the excess collateral as defined in the third party custody agreement to my client.

And so what we're talking about is a procedural issue about whether my client should be before the Court on an adversary proceeding or as part of the claims process. And since all the facts are stipulated to, we don't think it makes a difference what procedural posture that we're in

But having said that, that's the reason why we filed the motion for summary judgment so that we would have a procedural vehicle for the Court to grant us the relief directly that we're seeking but you needed -- in order to do

that, you need to address the issue of the status of the third party custody arrangement. Otherwise, what -- we would back here with an adversary proceeding, a motion for summary judgment, which recites exactly the same facts and the Court will then have to address that issue at some future time.

THE COURT: Okay. Well, you're shifting into a different subject, which is the procedural posture of the current dispute and the motion to strike your summary judgment motion which you have opposed and SIPC has joined in the trustee's motion to strike. I think we might as well address that now --

MR. KIRBY: I agree.

THE COURT: -- because we're talking about it.

And I'm going to give the trustee an opportunity to press its trustee's motion to strike. You can then oppose it. I don't think we should spend a lot of time on it because it is my candid view that it -- that's a sideshow to the current dispute that your motion for summary judgment was not consistent with local practice that calls for a premotion conference before filing such a motion. And more to the point, it's a motion for summary judgment that applies not to an adversary proceeding, not to a motion that you have brought but rather, to a motion brought by the trustee that is by its very nature, part of the claims process.

And so I have some questions as to how you could file

a motion for summary judgment consistent with what we're doing. It seems to me that I either agree with the trustee and SIPC or I agree with you in connection with the claims allowance process. If I agree with you but I find that I'm agreeing with you for reasons that are outside of the four corners of the claims process itself in terms of the substantive reasons. We'll find by stipulation and as so ordered to give you the relief that you're entitled to if in fact, I agree with your position since you told me that everything that you're raising now you would be raising in the context of an adversary proceeding and a summary judgment motion in that proceeding.

So what I'm telling you is I think your summary judgment motion is procedurally improper at this moment but I don't think it matters. It's, for all practical purposes, a non-issue but I'll hear what the trustee has to say and if the trustee just agrees with me, this becomes a short argument.

MR. CHAMIE: Thank you, Your Honor. Ramsey Chamie from Hughes Hubbard & Reed on behalf of the LBI trustee. Just very briefly, the summary judgment motion did not comply, as you've stated -- as the Court has stated, with the Court's November 5th consent order or the local bankruptcy rules. The consent order was the result of extensive communications among Fifth Third, SIPC and the trustee. And it set forth a briefing schedule to fully address the fund's objection. The fund consented to the schedule and it did not contemplate separate

unnecessary motion for summary judgment.

In addition, as the Court has noted, the motion is in direct violation of local bankruptcy rule 70561(a). We believe -- the trustee believes that the motion is burdensome in time and expense and it's redundant. I have no further comments on that unless you have any questions.

THE COURT: So do you agree with what I said or not?

MR. CHAMIE: Yes, we agree fully. Thank you.

(Laughter)

THE COURT: Okay. All right.

MR. CAPUTO: SIPC also agrees with the Court, Your Honor. Ken Caputo for SIPC, just one other point. The dispute over their claim is a contested matter in -- under the rules. And this court has the opportunity to issue a final order dissolving -- resolving their claim, which is -- you know, gives them all the attendant rights.

The fact that we've got a sideshow of another motion as an end-around in an attempt to either put in a different exhibit or make some reference to some point that was in a stipulation. That's really a sideshow.

THE COURT: Is there any dispute that I can take a look at the custody agreement?

MR. CAPUTO: Not at all, not at all. You can look at everything. We have no problem with the facts.

THE COURT: Fine. So, it seems to me that the way to

resolve the motion for summary judgment is that it's procedurally improper but it nonetheless has -- by virtue of supplements to the stipulation of uncontested facts, brought to my attention a couple of documents. If there is no dispute, I will take a look at those documents as part of the record.

MR. CAPUTO: No dispute, Your Honor.

THE COURT: Fine.

MR. CHAMIE: No dispute from the trustee, Your Honor.

THE COURT: Fine. So the record is supplemented, pursuant to a completely inappropriate procedural gambit. And the parties have consented to it and -- now, I interrupted your argument to deal with that separate question. I just want to make sure that from Fifth Third's perspective, that your presentation of the substance of your position is complete.

MR. KIRBY: No. I would like to address with the Court -- with your permission of course, the issue of what the substance of that third party custody arrangement does say. I -- what I would do is -- you know, given the time and so forth, what I would offer is an exhibit which is a copy of the special custody agreement. We've highlighted the provisions which we think are the controlling provisions --

THE COURT: Is this already in the binder?

MR. KIRBY: Yes.

THE COURT: Except for the highlighting?

MR. KIRBY: Except for the highlighting.

THE COURT: Why don't you just tell me what provisions you highlighted?

MR. KIRBY: Okay. I've highlighted Sections 2(e) --

THE COURT: Okay.

MR. KIRBY: -- 2(f) and 3(a). 2(e) defines what is excess collateral.

2(f) states that the collateral should at all times remain the property of the pledgor, subject to the extent and the interests and rights to the secured party, which you would expect in a third party -- security agreement.

And 3(a) describes in further detail -- and we've cited these provisions in our papers.

THE COURT: Okay.

MR. KIRBY: Those are the provisions that I think you need to address and I apologize to the Court about the procedural issue but as long as all -- we can get a resolution of all issues today through one process, that's fine. Then all parties will have been reserved the rights.

THE COURT: Okay. Are you now --

MR. KIRBY: Unless the Court has questions, I have nothing further.

THE COURT: Okay. Now, I'll ask if the trustee or SIPC wishes to state anything further in light of the argument that has taken place with Fifth Third.

MR. CHAMIE: Ramsey Chamie from Hughes Hubbard on

behalf of the trustee. The trustee believes that the agreement that's just been entered into the record should, of course, be read in whole, fully, all provisions, not just those highlighted here at this hearing.

Thank you.

THE COURT: Okay.

MR. CAPUTO: We concur, Your Honor, and that's it.

THE COURT: All right. I'll reserve decision. I will read the entire agreement and get home safely.

We're adjourned.

MR. KIRBY: Thank you, Your Honor.

(Proceedings concluded at 12:43 p.m.)

C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

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